United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

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77-5004

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P/S

United States Court of Appeals

SECOND CIRCUIT

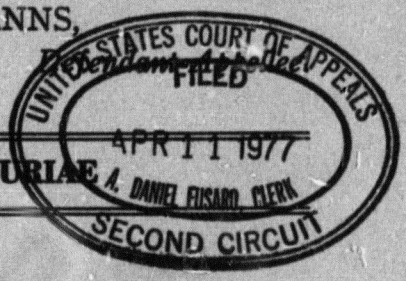
HOUSEHOLD FINANCE CORPORATION,

Plaintiff-Appellant,

—against—

KEITH ORIN DANNS, a/k/a KEITH O. DANNS, a/k/a KEITH DANNS,

Defendant-Appellee.



BRIEF AMICUS CURIAE

SCHEINBERG & FINNO
Attorneys for New York State Consumer Finance Association
16 Court Street
Brooklyn, New York 11241
Phone: (212) 855-2335

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United States Court of Appeals

SECOND CIRCUIT

HOUSEHOLD FINANCE CORPORATION,

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—against—

KEITH ORIN DANNS, a/k/a KEITH O. DANNS, a/k/a KEITH DANNS,

Defendant-Appellee.

BRIEF AMICUS CURIAE OF THE NEW YORK STATE CONSUMER FINANCE ASSOCIATION

Permission to File a Brief Amicus Curiae

This brief is filed on behalf of the New York State Consumer Finance Association and accompanied by written consent of all parties pursuant to Rule 29 of Federal Rules of Appellate Procedure.

Nature of Case

The nature of this action, the pleadings, and other facts are set forth in Appellant's brief, and accordingly we shall not undertake more than a brief outline.

Household Finance Corporation (HFC) commenced an adversary proceeding pursuant to Section 17c of the Bankruptcy Act and Rule 703 of the Bankruptcy Rules requesting that the debt owed to it be declared non-dischargeable and that a judgment for the amount of the debt be granted. The basis for the relief requested is that the liability is one for obtaining money and an extension or renewal of credit in reliance upon a materially false statement in writing respecting the bankrupt's financial condition made with intent to deceive. Section 17a(2) of the Act.

Although the learned Bankruptcy Judge found that the bankrupt's financial statement to HFC was materially false in writing, was given with intent to deceive and was relied upon by the plaintiff, he nevertheless denied HFC's application to have the debt, which then amounted to $2189.31, declared non-dischargeable and held that a discharge was barred only as to the sum of $483.00, the "fresh cash" received by the bankrupt at the time of submitting the false financial statement.

On appeal to the District Court, Hon. Edward R. Neaher, United States District Judge for the Eastern District of New York, in an order dated January 17, 1977, affirmed the decision of the Bankruptcy Judge.

Interests of Amicus Curiae

This brief amicus is presented on behalf of the New York State Consumer Finance Association which is a trade association of consumer finance companies. Its member companies collectively maintain 403 licensed offices within New York State. These offices, together with the 121 branch offices maintained by the plaintiff-appellant in this action, represent 95.1% of all such licensed offices in the State of New York.

It is imperative that in making loans, these offices make use of some form of a written financial statement which will disclose the amount of the borrower's outstanding obligations. This is the only way that consumer credit grantors may make an intelligent decision on the need for and use of consumer credit.

The association advocates that consumer borrowers should be encouraged to give complete and accurate financial statements when negotiating a loan. If a borrower deliberately conceals material information regarding his credit, he should not be permitted to profit by his deception. By reason of his fraud, he should not be entitled to avoid repay-

ment of any part of his debt through bankruptcy. The clear and explicit language of Section 17a(2) of the Bankruptcy Act evinces a legislative intent to except from discharge a debt obtained by false representations.

The fresh-cash decisions demonstrate an attempt on the part of the Courts to legislate. The purpose, therefore, of this brief is to demonstrate that the Court below erred in its judicial interpretation of the language of Sec. 17a(2) of the Bankruptcy Act.

Question to Which This Brief is Addressed

Where a lender has renewed a loan and is granted an additional cash advance evidenced by one new note for the total debt upon the bankrupt's deliberately false written statement submitted with the intent to deceive and relied upon by the lender as found by the Bankruptcy Judge, should not the full amount of the debt be held non-dischargeable rather than merely the amount of the new advance, under Section 17a(2) of the Bankruptcy Act?

POINT 1

THE CLEAR AND EXPLICIT LANGUAGE OF SEC. 17a(2) OF THE BANKRUPTCY ACT EVINCES A LEGISLATIVE INTENT TO EXCEPT FROM DISCHARGE A DEBT OBTAINED BY FALSE REPRESENTATIONS.

1. Introductory

Section 17a of the Bankruptcy Act, 11 U.S.C. § 35, as to the pertinent part, reads as follows:

> "(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as. . .

> (2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition . . . with intent to deceive. . ."

Under prior law, a false financial statement was a ground for objecting to the discharge of the nonbusiness bankrupt. Prior to 1960, section 14a(3) required the referee to deny a discharge with respect to all the bankrupt's debts if it was established that the bankrupt made a materially false financial statement in negotiating a loan.

Since this complete denial of discharge was too severe a penalty for the non-commercial bankrupt, on July 12, 1960 section 14a(3) was amended. With this amendment, the false financial statement as a ground for objecting to the discharge of the nonbusiness bankrupt was removed and the exception for "obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false financial statement . . ." was added to section 17. (11 U.S.C. § 35). Obtaining money, property or credit or the extension or renewal of credit by the use of such a false financial statement now resulted in a non-dischargeable debt .

In 1970, section 17 was again amended and 17c was added by Pub. L. No. 91-467 §§ 5-7, 84 Stat. 992. The federal courts now had exclusive jurisdiction to determine dischargeability under this section.

2. The Pre-1970 Interpretation of the Statute.

Prior to the 1970 amendment, actions involving false financial statements by non-commercial bankrupts were usually commenced in the state courts, subsequent to the

bankrupt receiving his discharge. The creditor would commence an action in contract on the promissory note and the debtor would set up the affirmative defense of discharge in bankruptcy. The creditor then could show without any further pleadings, that the debt was excepted from discharge under the Bankruptcy Act because it was a liability incurred by false representations. It was necessary only for the creditor to prove it, not as a part of his cause of action but as an answer to the affirmative defense set up. In showing that the debt was created by fraud, the creditor did not change his cause of action from contract to fraud, instead he was merely trying to prevent his claim from being barred by the discharge.

The issue which arose was whether the action was one dealing with a contractual liability in connection with which money or property was obtained by false representations or a naked tortious claim resulting from obtaining money or property by false statements.

If it was an action in tort, then clearly the "actual pecuniary loss" rule would apply and the creditor's damages would be limited to only the cash actually advanced. If, on the other hand, a contractual liability was involved then upon demonstrating the bankrupt's use of a false statement, the entire contractual obligation, i.e. the debt, would be excepted from the effect of the discharge and the creditor would be entitled to a judgment for the balance owing.

The development of New York law on this issue, prior to the 1960 amendment, is most capably analyzed by Justice Deyo in the case of *Personal Finance Co. of Waterbury* vs. *Robinson,* et. al., 27 N.Y.S. 2d 6, 9 (S. Ct., Madison Co., 1941). He declared:

> "The question was specifically passed upon in Argall v. Jacobs, 87 N.Y. 110, 41 Am. Rep. 357. There, as in the case at bar, an action was brought upon a promissory note and no fraud was alleged in the

> complaint. The answer, as here, set up as an affirmative defense, a discharge in bankrupcy. Upon the trial the plaintiff was permitted to give evidence tending to show that his debt was 'created by the fraud of the bankrupt,' which was the wording of the statute at that time. The appellate court held this to be proper and affirmed the judgment for the plaintiff, saying at page 113 of 87 N.Y.: 'But it is further contended on the part of the defendants that the plaintiff cannot have the benefit of the limitation contained in the act of 1867, because he did not base his cause of action upon the alleged fraud, but upon the promissory notes, making no allusion to the fraud in his complaint. *It is not provided that no cause of action for fraud shall be discharged, but that 'no debt created by fraud' shall be discharged.*" (Emphasis added)

Subsequent to the 1960 amendment, this issue arose in the case of *Family Finance Corp.* v. *Lyons,* 62 Misc. 2d 985, 310 N.Y.S. 2d, 514 (App. Term 1st. Dept. 1970). The Appellate Court, rather than deciding the case on the contract-tort issue, simply looked to the new amendment, which removed any doubt on the subject. The Court held in a unanimous decision:

> "The conflict in views as to whether such a defrauded creditor could recover for extension or renewal of credit included with fresh cash at time of execution of new note and the then submission of a false financial statement, was resolved by the 1960 amendments of the Bankruptcy Act, sec. 17(a)(2) [11 USCA, sec. 35(a)(2)] and sec. 14(c)(3) [11 USCA, sec. 32(c)(3)], clearly excluding from the effect of a discharge in bankruptcy 'liabilities for obtaining money or property

> on credit, or obtaining an extension or renewal of credit, in reliance upon a materially false statement in writing respecting the bankrupt's financial condition made or published in any manner whatsoever with intent to deceive'. See also, First Credit Corporation v. Wellnitz, 21 Wis. 2d 18, 123 N.W. 2d 519 and M-A-C Loan Plan, Inc. v. Cooper, 23 Conn. Sup. 184, 1 Conn. Cir. 169, 179 A.2d 313."

The language of the Statute was found to be controlling. This explicit and unequivocal language includes all "liabilities". No provision exists for a fresh-cash limitation.

A similar result is found in *Local Indus. Fin. Company* v. *McDougale,* 404 S.W. 2d 798 (Ky. 1966). The Appellate Court wrote:

> "The issue here is this: Whether the exception made by Section 17(a)(2) is limited to the new money (and charges therefor) obtained by McDougale from Local on January 12, 1961, as the trial court held, or embraces also the extension of and renewal of credit on the balance due on the original note, obtained by him at the same time and as a part of the same transaction."

and (at 404 S.W. 2d 792):

> "Without question in the 1960 amendment must be said to strengthen and reinforce this view, its language expressly covering the giving of a false statement to obtain money or credit, or to obtain an extension or renewal of credit. And so a large majority of the courts of other jurisdictions have held that where the debtor obtained the renewal or extension of the balance due on an old note and new cash, all incorporated in a note, by false pretenses,

> false representations, or the giving of a false financial statement, he is not released by subsequent discharge in bankruptcy *from any part of the new note. The whole note is still collectible.* C.H.F. Finance Company v. Jochum, 241 La. 155, 127 So. 2d 534; MAC Loan Plan v. Cooper, 23 Conn. Sup. 184, 179 A.2d 313; First Credit Corporation v. Wellnitz, 21 Wis. 2d 18, 123 N.W. 2d 519."

and (at 793):

> *"The false statement encompasses and permeates the whole transaction."* (Emphasis added.)

Likewise in *Household Fin. Corp.* v. *Walters,* 8 Ariz. App. 144, 443, P.2d 929 (1968) the Court of Appeals stated (at 931):

> "Cases involving renewal or extension loans decided under Section 17(a) (2) as altered by the Cellar Amendment have uniformly given effect to its new provisions and have held that the lender may recover the renewed prior indebtedness as well as the new money advanced at the time of the making of the false financial statement."

and moreover (at 932):

> "We must disagree * * * with the trial court's factual-legal conclusion that there was no proof adduced that appellant extended or renewed its previous loan on the strength of false representations by Walters. There is no question but that the existing indebtedness on the previous loan was at least renewed on June 9, 1965, whether or not it was also extended at that time. 'Renewal' and 'extension' of credit are referred to in the disjunctive in the federal

statute, and accordingly either alone would be a sufficient detriment to support the lender's action."

Advance Loan Co. v. *Bell,* 75 N.M. 204, 402 P. 2d 944 (1965), similarly deals with the issue this way:

> "Insofar as relying upon the financial statement is concerned, we adopt the statement in the case of Industrial Bank of Commerce v. Bissel, 2 Cir., 219 F.2d 624, as follows:
>
> "* * * However, reliance on a financial statement need not be proved by direct testimony. Ordinarily it may be proved by evidence showing that the statement was made to support an application for credit and that credit was given after receipt of the statement. * * *" And, under the clear dictates of the Bankruptcy Act, as amended, 11 U.S.C.A. § 35, sub. a(2): '* * * or obtaining an extension or renewal of credit * * *.' the fact that the note was substantially a renewal of an *existing debt does not make it dischargeable* by *bankruptcy, either in full or as to the amount of the existing debt.* See First Credit Corporation v. Wellnitz, 21 Wis. 2d 18, 123 N.W. 2d 519, for an excellent discussion of the amendment to 11 U.S.C.A., § 35." (Emphasis added)

Prior to the 1960 amendment, the courts of Wisconsin had held the minority view that only the new advance was non-dischargeable.

In the case decided by the Supreme Court of Wisconsin on October 1, 1963, entitled *First Credit Corporation* v. *Charles Wellnitz,* 123 N.W. 2d 519 (Wisc. Sup. Ct. 1963), the bankrupt had obtained a new loan from the First Credit Corporation in the amount of $1,449.00 out of the proceeds of which he received $303.72 in cash and the balance was

applied to pay off the amount owing on an existing loan with the same lender. The new loan was obtained through false representations in the financial statement and the lender instituted suit in the State court to obtain judgment in the amount of $1,399.77, the amount then due on the new loan. There was no real question as to the misrepresentations, but the trial court awarded judgment only in the sum of $303.72, the amount of new cash advanced at the time of the last loan transaction. The trial court relied on the case of *Household Finance Corp.* v. *Christian,* 8 Wis. 2d 53, 98 N.W. 2d 390 (1959), which had held that one who obtains an extension of credit by means of a materially false financial statement and who thereafter received a discharge in bankruptcy remains legally responsible only for the new portion of the debt, i.e. that portion of the total debt which represented fresh cash received at the time of the extension. The *Christian* case was decided before the 1960 Amendment to the Bankruptcy Act.

Judge Gordon, speaking for the Supreme Court of Wisconsin, said that "we must determine whether the amendment of Section 17a of the Bankruptcy Act has caused a change in the law of this state with reference to the effect of a discharge in bankruptcy." In holding that the amendment did bring about such a change, the court went on to say:

> "It should be noted that absent the 1960 change in the Bankruptcy Act, Wisconsin was one of a minority of states which limited the creditor to judgment for the amount of fresh cash advanced. The majority of courts took the view that where there had been a prior existing obligation and a new loan was negotiated for an additional amount, the giving of a false financial statement at the time of the new loan permitted the creditor to recover the entire indebtedness. See *Personal Finance Company* v. *Bruns*

(N.J.) Super., App. Div. 1951), 16 N.J. Super. 133 84 A. (2d) 32.

We consider that the amendment of sec. 17(a) necessitates our reexamining the result which we reached in the *Christian Case*. Although no appearance was made in this court by the respondent, we have determined not to apply our court rule, sec. 251.57, Stats., which would permit us to reverse the judgment as a matter of course. Instead, we have determined to address ourselves to the merits of the issue, since we are persuaded that the *Christian Case* has been superseded because of the change in the federal statutes.

Sec. 17(a) of the Bankruptcy Act must be read in conjunction with sec. 14(c) of the Bankruptcy Act, 11 U.S.C. sec. 32(c) (3), which was amended at the same time as sec. 17(a). The amendments to both sections on July 12, 1960, demonstrate that it was the intent of Congress to eliminate the false financial statement as a ground for the denial of a complete discharge in bankruptcy (except for those engaged in a business), while making it clear that debts incurred by means of such statements would not be discharged in bankruptcy."

* * *

"The legislative history of these sections supports the view that it was the will of Congress to extend the scope of the exception where a materially false statement in writing was made. See Senate Report No. 1688, 86th Congress, 2d Session, June 24, 1960, reported in Vol. 2, 1960 U.S. Code Congressional and Administrative News, p. 2954. The report states (p. 2956):

'The purpose of this amendment is to assure that although the obtaining of money or property on

credit through the issuance of a false financial statement is no longer to be ground for denial of a discharge to a nonbusiness bankrupt, any obligation incurred as a result of such a statement [is] to be nondischargeable under section 17. The addition of the elements of reliance by the creditor and intent to deceive by the debtor are merely enactments of existing case law.'"

* * *

"To the best of our knowledge, none of the states (including Wisconsin) constituting the minority view on this question has been called upon to pass upon the effect of the change in the Bankruptcy Act. However, several courts have cited the statutory change as removing any uncertainty which may have existed under the previous statute. See, e.g., *M-A-C Loan Plan, Inc.* v. *Cooper* (1961), 23 Conn. Supp. 184, 179 A. (2d) 313; *Matter of Croston, Bankrupt*, No. 46108, U.S. District Court for the Western District of New York, decided February 8, 1962 (unreported case discussed in Brown, Full Amount of Bankrupt's Indebtedness to Lender Nondischargeable—Where Last Loan Obtained by False Financial Statement, 16 Personal Finance Law Quarterly Report (Spring, 1962), 41).

We conclude that in view of the change of the statutes the *Christian Case* is no longer operative, and the appellant was entitled to judgment for the sum of $1,391.77 instead of $303.72 against the respondent Charles Wellnitz."

3. Application of Section 17a(2) by the Federal Courts

Subsequent to the 1970 amendment, the federal courts had exclusive jurisdiction to ascertain dischargeability. The referees in bankruptcy, while applying a strict interpretation

of the statute and relying on precedent state court decisions, excepted from discharge those debts obtained as a result of false statements and granted judgments for the full balance remaining on a loan.

In 1973, however, several referees began to propound a "new" philosophy as to the interpretation of this section. Decisions began appearing limiting judgments to the fresh cash, thereby completely ignoring the unyielding provisions of section 17a(2) and the mass of uniform authority that had been built up over the years.

In Re Soika, 365 F. Supp. 555 (W.D.N.Y. 1973); *In Re Schuerman,* 367 F. Supp. 1347 (E.D. Ky. 1973); *In Re Fuhrman,* 385 F. Supp. 1185 (W.D.N.Y. 1973); *In Re Birkholz,* No. 71 B 517 (W.D. Wisc. Feb. 11, 1972) summarized in 1970-73 Transfer Binder CCH Bank L. Rptr. 64, 316.

These federal court decisions fail to follow the specific language of section 17a(2) while inadvertently using the term "fraud" to characterize its provisions. Hence, a body of federal law is being built up around the concept of "fraud". It is not provided in the Act that no cause of action for fraud shall be nondischargeable but that no *debt* created by a false credit statement shall be discharged.

In the instant case, HFC does not maintain an action in tort to recover damages sustained as a result of the bankrupt's false statement. HFC, however, maintains an action wherein it alleges grounds to except its debt from discharge under section 17a(2) of the Act. Although the elements necessary to maintain an action under 17a(2) may be similar to those in an action in fraud, the difference lies with the element of damages.

The language of section 17a(2) is clear and unequivocal. If the objecting creditor sustains its burden of proof under this section, the court must find that the debt is not dischargeable.

Although the learned trial Judge found that the bankrupt obtained money and a renewal or extension of credit on a false financial statement he held that only a portion of the debt was not dischargeable in contradiction with the explicit language of the Act. Clearly the bankruptcy judge fell victim to the misconception that this was an action in tort and, therefore, applied the "pecuniary loss rule".

The statute sets forth the result which must flow when a creditor demonstrates that the bankrupt has made a false financial statement in negotiating a loan. The debt, i.e. the entire amount which is due from the bankrupt to the creditor as set forth in the contract, is not dischargeable.

This very result was reached in *Matter of Raymond Henry Goff, Jr., Bankrupt* in the United States District Court for the Northern District of West Virginia (Bk. 71-31-W). An application for determination of dischargeability of debt under Section 17c of the Act had been filed by Midland Finance Company, a creditor. We quote from the Referee's Certificate on Petition for Review:

> "To the Honorable Robert E. Maxwell, Chief Judge of the U.S. District Court for the Northern District of West Virginia:
>
> I, John H. Kamlowsky, the Referee of said Court in Bankruptcy, do hereby certify that the captioned case was filed in this Court on March 19, 1971; that in the course of the proceedings of this matter before me Midland Finance Company, a corporation, filed an Application for Determination of Dischargeability of Debt and for other elief under Sec. 17(c) of the Bankruptcy Act on May 3, 1971, and the following question arose:
>
> Where an Application for Determination of Dischargeability of Debt under Sec. 17(c) of the Bankruptcy Act has been filed with the Court by a cred-

itor, and the Promissory Note in question is a renewal note, and the Bankrupt offers to confess judgment only for that sum which he actually received at the time of the execution of the renewal note, should he be permitted to confess judgment to that sum or be permitted only to confess judgment to the total amount of the renewal note?

I permitted the said Bankrupt to confess judgment to only that sum received by him at the time of the execution of the renewal note for the reasons set forth in my Finding of Facts and Memorandum of Law, dated October 5, 1971."

The petition for review alleged that the bankrupt's renewal note of $1,114.80 was a nondischargeable debt. The creditor alleged that it had surrendered the bankrupt's previous overdue note and lent the bankrupt additional cash in the sum of $53.13 in return for the bankrupt's renewal note, that the transaction was made in reliance upon the bankrupt's materially false statement in writing respecting his financial condition and that the bankrupt had intentionally deceived the creditor thereby.

On review, the United States District Judge made the following order entered January 28, 1972:

"MEMORANDUM ORDER

The Court has now carefully considered the Referee's certificate on petition for review, with accompanying documents, being designated items 'A', 'B', 'C', and 'D'.

Upon careful consideration of the thorough four page 'Findings of Facts and Memorandum of Law' of the Referee, the Court is satisfied that the Referee's determination is consistent with a basic quality of fundamental fairness, but as reflected from the record before this Court the objection to the bankrupt's discharge both as to the note renewed as

well as the 'new money' plus accrued interest is governed by the unyielding provisions of Section 17a(2) of the Bankruptcy Act, Title 11, U.S.C.A., Section 35(a) (2), as amended 1960.

Upon the record before the Court and for the reasons stated, it is ORDERED that the determination of the Referee in Bankruptcy as to the discharge of the bankrupt be, and the same is hereby reversed, and remanded to the Referee for such further proceedings as shall be necessary and not inconsistent with these findings.

ENTER: January 28, 1972.

/s/ ROBERT E. MAXWELL
United States District Judge"

So also in *Matter of Shawn R. Olden, Bankrupt,* United States District Court, Southern District of New York (No. 71 B 244), Honorable Asa S. Herzog, Bankruptcy Judge, held:

"Applicant mailed an 'Application and Financial Statement' to bankrupt who filled in the blank spaces thereon, signed it, and returned it to applicant. The statement is dated July 25, 1970 (Exh. 1) . . . In reliance upon the truth of said statement the applicant loaned to the bankrupt the sum of $1,889.35 as follows: $1,626.32 was applied on account of and to discharge the old indebtedness, and the balance $263.03 was paid to bankrupt by check. The new debt was made payable in monthly installments, the last one to become due July 10, 1973 . . . The bankrupt knew that the said statement was false when she made it, and by concealing the extent of her indebtedness, intended to deceive the applicant.

The applicant would not have extended credit or made aforesaid loan to the bankrupt had it

known the true extent of her indebtedness on July 25, 1970 . . ."

* * *

"The aforesaid debt to applicant is a liability for obtaining money or credit and an extension or renewal of credit in reliance upon a materially false statement in writing respecting her financial condition made with intent to deceive and pursuant to Bankruptcy Act Sec. 17a(2) is not dischargeable. The applicant is entitled to judgment against bankrupt for the sum of $1,245.91 with interest from April 30, 1971."

The very question now before this Court was squarely presented in *Matter of Donald E. Shade, Bankrupt,* No. 73-BK-1018 in the United States District Court for the Western District of New York. (AD 1 of Appellant's brief) On similar facts, the Bankruptcy Judge limited the nondischargeable debt to the amount of the new advance. On appeal, the United States District Judge (Honorable Harold P. Burke) reversed and granted judgment for the entire unpaid balance of the note.

The court held:

"The 1960 amendment inserted in Clause 2 the prohibition against discharge in bankruptcy from debts which are liabilities for obtaining money or property on credit or obtaining an extension or a renewal of credit by furnishing false financial statements. The unequivocal language of Section 17a (2) of the Bankruptcy Act (11 U.S.C. Section 35a2), added by the 1960 amendment, requires a holding that the full amount of the indebtedness, including both the amount of the note representing an extension of the pre-existing indebtedness and that part of the note representing new money advanced, be held non-dischargeable."

CONCLUSION

When HFC granted the bankrupt the new loan and renewed the balance due on the existing loan evidenced by one new note for the total debt in reliance upon a false financial statement, the indebtedness of the bankrupt was represented by that new note. Not only did the plaintiff make a new advance in reliance on the false financial statement, but an inextricable part of the transaction was the extension and renewal of the existing loan. Clearly, that note comes squarely within the provisions applicable to nondischargeable debts.

Section 17a(2) leaves little room for judicial interpretation. The clear and explicit language of the statute evinces a legislative intent to except from discharge all debts obtained by false representations.

The "fresh-cash" decisions have erroneously characterized section 17a(2) as stating an action in fraud. It is because of the tendency of those judges to characterize this section, that there has been a clear misapplication of the law.

The characterization in tort of section 17a(2) has been rationalized by utilizing a doctrine of equitable principles while ignoring the explicit language of the statute. This rationalization is, in essence, a judicial attempt at creating new legislation. Until such time as the legislature amends the language of section 17a(2), the courts should follow the express provisions of this statute.

Respectfully submitted,

SCHEINBERG & FINNO
Attorneys for New York State
Consumer Finance Association